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No. 79-5903

In the Supreme Court of the United States

OCTOBER TERM, 1980

H—— L ——, etc.,

Appellant,

vs.

SCOTT M. MATHESON, et al.,

Appellees.

On Appeal From The Supreme Court Of The State Of Utah

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLEES, SCOTT M. MATHESON, et al.

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BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLEES, SCOTT M. MATHESON, et al.

INTEREST OF THE AMICUS

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of

dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every State of the union.

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This brief is filed in support of Appellees Scott M. Matheson *et al.* Letters of consent for the filing of this Brief have been sent to this Court by both the Appellants and the Appellees.

SUMMARY OF THE ARGUMENT

The Utah parental notice law now before this Court differs substantially from the Massachusetts and Missouri parental consent laws at issue in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), *Bellotti* v. *Baird (I)*, 428 U.S. 132 (1976), and *Bellotti* v. *Baird (II)*, 443 U.S. 622 (1979): it merely provides notice to parents that their minor daughter is seeking an abortion.

This notification does not violate any privacy right against public disclosure, since the minor's parents are not members of the general public, but rather guardians with responsibility for her care and nurture.

Unlike the statutes previously before this Court, the Utah law requires no consent to the procedure by the parents. Thus, even if in a rare instance a parent, once notified, should obstruct or burden the effectuation of the minor's provisonal abortion decision, such private parental acts would not constitute state action since parents are not agents of the State for the purpose of rearing and raising children. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Nor could such acts be imputed to the State under the "state action" decisions of this Court. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Providing a parent with notice of a child's provisional decision to have an abortion is principally designed to permit parents to exercise their fundamental rights and responsibilities as parents to support and guide their child who is facing a difficult decision, rather than to carry out the acts or the policies of the State. Any nexus that may exist between the notice required by the State of Utah and a hypothetical instance of subsequent burdensome parental conduct is too remote to warrant a finding that such parental conduct can properly be imputed to the State.

Utah has significant state interests in protecting the fundamental rights of parents in their child-rearing role and in enhancing the integrity of the minor's decision whether to carry her pregnancy to term or to terminate it. Even if the Utah law imposed a burden on a right of the minor, it would be constitutional because the State's interests are significant and the Utah law rationally serves those interests. *Planned Parenthood* v. *Danforth,* 428 U.S. at 75.

The intended purpose and primary effect of the Utah law are to enhance parent-child communication and consultation about a decision of fundamental import in the child's life. In the words of Mr. Justice Stevens, "It is unrealistic . . . to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will [act] arbitrarily to further a selfish interest rather than the child's interest." *Planned Parenthood* v. *Danforth,* 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part). The parental notification statute advances the long-range best interests of the minor child by protecting her from the consequences of her own fears and reluctance to involve her parents.

ARGUMENT

I.

THE UTAH PARENTAL NOTIFICATION STATUTE DOES NOT CONSTITUTE STATE ACTION IMPINGING ON ANY PRIVACY RIGHT OF THE MINOR

In *Whalen* v. *Roe,* 429 U.S. 589, 699-600 (1977), this Court identified "two different kinds of interests" as being protected by the constitutional right of privacy: "the individual interest in avoiding disclosure of personal matters" and "the individual interest in independence in making certain kinds of important decisions." Because these two interests are distinct, they must be analyzed separately. Principles applicable to one interest are not necessarily applicable to the other.

The Utah statute does not impinge on constitutionally protected aspects of either interest.

A. The Statute Does Not Impinge On Any Possible Privacy Right of the Minor to Prevent Public Disclosure of Her Proposed Abortion

The minor possesses a general right not to have her "private affairs made public by the government." Kurland, *The private I,* The University of Chicago Magazine 7, 8 (Autumn 1976), quoted with approval in *Whalen* v. *Roe,* 429 U.S. at 599 n.24. But it does not follow that a minor may properly assert such an interest in nondisclosure as against her parents. Nor does it follow that a law which provides only that parents be notified of their daughter's provisional abortion decision constitutes a

"public disclosure" against which the minor's right to privacy may properly be invoked.

The Utah law does not vest parents with the "veto power" over the minor's abortion which the State itself does not possess, as would a parental consent statute. *Compare Planned Parenthood* v. *Danforth,* 428 U.S. at 74. Rather, it provides the parents only with knowledge of the contemplated abortion. This Court has held that the States do possess the power to require that abortions be reported to appropriate state agencies. *Id.* at 79-81 (upholding a statute which required the names of women who procure abortion and relevant medical data to be reported to the State). *See also Bellotti* v. *Baird (II),* 443 U.S. at 643-644 (plurality opinion), (warranting a statutory scheme by which parents or, in the alternative, a judicial agent of the State receive notice); *Whalen* v. *Roe,* 429 U.S. 589 (1977), (upholding a law requiring that the State be notified of all recipients of certain drugs). Therefore, the State itself possesses the authority which it guarantees to parents under the Utah law.

Like the reporting schemes upheld in *Danforth, Bellotti,* and *Whalen,* the Utah law does not result in broad public disclosure of the conduct in question. There is certainly no greater risk of unwarranted dissemination of information on the minor's abortion under the Utah law than in schemes which provide that a drug recipient's name must be included in a computer file (as in *Whalen*), or that the identity of women who have procured abortion must be reported to a state agency (as in *Danforth*), or that the minor who wishes to abort may be the subject of a judicial proceeding (as in *Bellotti II*).

None of these cases has held that the limited disclosure at issue amounted to an "undue burden" on the right to privacy. *A fortiori,* it would be particularly inappropri-

ate to hold that a minor might properly assert such an interest in non-disclosure against her parents.

Parents have a fundamental responsibility to nurture and guide their minor children, but can do so effectively only if they are aware of their children's problems and behavior. Neither our tradition of law nor any principle implicit in our concept of ordered liberty implies that the minor may properly assert a right to a "secret abortion" as against her parents. "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). Indeed, in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court held that in some circumstances the Constitution compels a State to respect the traditional authority of the parent.

Since "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents," *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944), it would be a major error to conceive the minor's non-disclosure privacy interest in a manner which foreclosed parental knowledge of a minor's important decisions. Only participants within the child's zone of familial privacy—not members of the public at large—are informed of the child's provisional decision to abort under the Utah law. Parental knowledge of this important conduct contemplated by their child does not make them interlopers in the minor's protected zone of informational privacy. Because the Constitution places the parents squarely *within* the boundaries of the minor's sphere of privacy, parents are not such strangers to their minor daughters that a constitutionally protected interest in informational non-disclosure may be properly asserted against them by their child.

B. The Utah Statute Does Not Impinge on the Minor's Privacy Right To Decide To Have An Abortion And To Effectuate That Decision

The Utah law provides no veto power to parents or to any third party over a minor's abortion decision. Under the Utah law, a minor may make and effect an abortion decision in "defiance of the contrary opinion of the sovereign or other third parties." *Bellotti* v. *Baird (II)*, 443 U.S. at 655 (Stevens, J., concurring in the judgment).

Since the law now before this Court grants neither to parents nor to any agency of the State any power to obstruct effectuation of a minor's abortion decision, it differs fundamentally from the Missouri law struck down in *Planned Parenthood* v. *Danforth* which imposed an "absolute limitation on the minor's right to obtain an abortion" by providing one of her parents with the right to veto a proposed abortion. 428 U.S. at 90 (Stewart, J., concurring). Similarly, it differs from the Massachusetts law, struck down in *Bellotti* v. *Baird (II)*, which required that the minor obtain the consent of both of her parents prior to an abortion or, if one or both of her parents refused consent, that the minor obtain the consent of the State. 443 U.S. at 630.

Accordingly, any claim that the Utah statute facially burdens the right of the minor to decide whether or not to abort would have to be based on a theory that the child's awareness that her parents will be informed will in some manner influence her not to procure an abortion, or to procure an abortion under undesirable circumstances. But all sorts of governmental action may "influence" constitutionally protected decision-making without rendering that action unconstitutional.

For example, one may have a First Amendment right to form and to hold an adverse opinion about racial minorities. Although the State's legitimate interest in promoting integration of the races would not be sufficiently compelling to punish expression of such an opinion, this does not mean that it is unconstitutional for the government to wage a television advertising campaign to influence the public to accept all races as equal. This is so despite the fact that such governmental activity is *designed* to induce one to abandon one's constitutionally protected beliefs concerning racial minorities.

Similarly, the State may develop programs which seek to create a better environment for carrying children to term as, for example, by improving prenatal care and by satisfying more fully the subsistence needs of the poor. The existence of such programs might well "influence" someone undecided about whether to have an abortion. If any such influence were held to impinge on the fundamental privacy right to decide whether or not to carry to term, the result would be absurd.

With this statute, the Utah legislature sought to enhance a minor's decision-making and to strengthen the family unit by providing for parental consultation concerning a critically important decision in their daughter's life. As Mr. Justice Stevens pointed out,

> An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable.

Planned Parenthood v. *Danforth,* 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part).

Merely because the Utah law may "influence" some minors' decisions whether or not to abort does not mean that it impinges on their constitutionally protected privacy interest.

C. Parental Responses To Notification Which May Obstruct Effectuation of the Minor's Abortion Decision Cannot Be Imputed to the State

On its face, the Utah law does not impinge on the minor's privacy right, as the preceding sections have shown. It may be argued, however, that the Utah law unconstitutionally burdens the minor's right because of the prospect that *some* parents who are notified in accordance with the Utah law *may* obstruct their daughter's access to an abortion. But the Fourteenth Amendment, from whose provisions the privacy right encompassing the decision whether to terminate pregnancy is drawn (*Roe* v. *Wade,* 410 U.S. 113, 153 [1973]), operates only against the *State.* In order for the statute to be stricken on the basis of potential parental obstruction two things must be shown. First, it must be demonstrated that such parental conduct would, by virtue of the notification law, become state action. Second, it must also be shown that such conduct should be imputed, not merely to the State, but to the notification statute itself. Only if both propositions are accurate can the statute be stricken.*

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* It would be insufficient merely to demonstrate that the statute converts parental conduct into state action, even if this could be done. A police officer carrying out duties authorized by statute may, in the course of them, commit unjustifiable homicide. For the purposes of an action against the municipality for wrongful death, this might be state action. But this would not mean that the prospect of such abuses of police authority would be properly attributed to the statute authorizing a police force, requiring that the *statute* be held unconstitutional.

First, the Utah statute grants to parents, and to parents alone, the right to be informed that an abortion is to be performed on their minor daughter. It must be presumed that parents will act in the best interests of their children. *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). But even if parents notified of their daughter's intended abortion actually attempted to obstruct the abortion, such parental conduct would not constitute the state action precluded by the Fourteenth Amendment. If parents in the State of Utah have any legal authority to control the conduct and behavior of their children, it does not arise from this statute. Insofar as parents exercise supervision over their children, they are not thereby acting as agents of the State.*

Nor does the existence of the notification statute transform such private parental conduct into state action. The causal nexus or points of contact between the private conduct of the parents and the State created by the Utah law are simply insufficient to warrant the conclusion that a parental response which prevents the minor from procur-

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* An interpretation of the Constitution which dealt with parental supervision of their minor children as though it were based on authority "delegated" by the State would not only violate long established tradition, but also run counter to recent findings in modern psychiatry and psychology. The recent publication by Joseph Goldstein, Anna Freud, and Albert J. Solnit of *Before the Best Interests of the Child* (1979) culminates and summarizes the contemporary discovery of "complex and vital developments" in the psychological growth of the child through adolescence which "require the privacy of family life under guardianship by parents who are autonomous. . . . The child's need for safety within the confines of the family must be met . . . through . . . recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing." *Id.* at 9. *See also The Psychological Aspects of Abortion* (D. Mall & W. Watts, ed. 1979).

ing abortion "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).*

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), this Court held that the racially discriminatory practices of a private club were not performed under color of state law merely because the State of Pennsylvania provided the club with a liquor license, even though the club would not have been able to conduct its discriminatory activity had the State not made the license available.

Any relationship here between the State and possible private parental conduct that obstructs abortion is significantly less intimate than the relationship between the State and the racial discrimination in private clubs considered in *Moose Lodge*. Under the Pennsylvania liquor licensing scheme there at issue, consent of the State through issuance of a liquor license was a necessary condition precedent to service of any liquor under any circumstances. To the extent that Pennsylvania licensed establishments to serve liquor, while knowingly permitting it to be served on a discriminatory basis, the State at least passively countenanced discriminatory conduct. Moreover, Pennsylvania's intrusion into the private market place through its complex and extensive system of alcohol regulation and "state store" system of carry-out liquor sales appeared to vest private liquor distribution practices with the

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* The statute before this Court hardly delegates to the parents any new power "traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352. Indeed, the common law typically provides for parental consent prior to medical treatment; it certainly does not acknowledge any right in the minor which may be asserted against parents' knowledge of the minor's conduct. *See* this Brief at 22-23n.

State's seal of approval.* But unlike the licensing scheme of *Moose Lodge,* under which Pennsylvania explicitly granted private clubs the authority to serve liquor—something they would lack in the absence of a license—a law which simply provides for parental notice prior to abortion in itself vests parents with no legal authority to supervise their daughter in a fashion which obstructs effectuation of their daughter's reproductive choices.

The Utah law is a state effort to support parents in exercising their already extant fundamental private right to nurture and guide their minor children. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925). *See also, Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 400 (1923). In this regard, the Utah law assists parents to exercise their basic responsibility to care for, nurture, and guide the moral development of their minor daughter. In contrast, the one Pennsylvania regulation struck down by *Moose Lodge* required private individuals to continue to adhere to racially discriminatory by-laws if their lodge

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* The rule which permits licensing of private clubs without regard to discriminatory practices might well lead to total or near total denial of access to service to members of one race, or to the segregation of all services, through the transformation of public establishments into private clubs. Yet the extent to which private clubs—whether a large majority or only a small minority—discriminate in practice makes no difference in whether or not state licensing constitutes state action. Similarly, the extent to which parents, in response to notification about their daughter's provisional abortion decision, may act to obstruct effectuation of such decisions is not relevant to the determination of whether any such parental conduct may properly be construed as state action by virtue of a parental notice law. As it happens, Plaintiffs and their Amici concede that many parents will not obstruct. *See, e.g.,* Brief of Medical Coalition for the Medical Rights of Women *et al.,* at 19.

was to continue to be licensed. Statutes which tend to implement the exercise of constitutionally recognized values, such as the right of parents to nurture and guide their minor daughters, warrant far greater deference than laws which permit conduct devoid of constitutional value, such as a racially discriminatory practice. As this Court has stated, distinguishing limited state aid to religious schools from analogous aid to private schools established to maintain racial segregation,

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. . . . However narrow may be the channel of permissible state aid to sectarian schools . . . it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

Norwood v. *Harrison*, 413 U.S. 455, 469-70 (1973).

The Constitution places "no value on discrimination" such as that practiced at the private club of *Moose Lodge*, while the right of parents to nurture and guide their minor children has been granted "affirmative constitutional protection." Therefore, the Constitution permits a greater degree of "state assistance" to parents in the exercise of their constitutionally recognized function of guiding their children than the State could provide to a private club which practiced racial discrimination.

At the very least, therefore, the nature of the right arguably affected by the Utah law here does not warrant application of a more *exacting* doctrine of "state action"

than was applied in *Moose Lodge*. The facts and circumstances of *Moose Lodge* concerned alleged state involvement in racial discrimination, the fault which the Post-Civil War Amendments were explicitly intended to remedy. On the other hand, the rights of parents were among those which the Post-Civil War Amendments were intended to assure.* The obligation of this Court to guard

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* The abolitionists considered one of the most repulsive features of the institution of slavery to be the power of private parties to cause the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Speaking in favor of the Thirteenth Amendment, Senator Harlan of Iowa noted that under slavery

> [T]he conjugal relationship is abrogated. . . . Another incident is the abolition practically of parental relation, robbing the offspring of the care and attention of his parents. . . . And yet . . . this guardianship of the parent . . . must be abrogated to secure the perpetuity of slavery.

Cong. Globe, 38th Cong., 1st Sess. 1439 (1864).
Similarly, Senator Wilson of Massachusetts explained that if the Amendment were adopted, "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law. . . ." *Id.* at 1324.

The clearest purpose of the Fourteenth Amendment was to provide former slaves access to the judicial process in order that they might vindicate commonly acknowledged rights—including the right to be free from invasion of family privacy by third-parties and to safeguard the integrity of the parent-child relation. *See* Green, *Relational Interests,* 29 Ill. L. Rev. 460 (1934); Foster, *Relational Interests in the Family,* 1962 U. Ill. L. Forum 493; Pound, *Individual Interests in the Domestic Relations,* 14 Mich. L. Rev. 177 (1916); G. W. Field, *The Legal Relations of Infants* 63-80 (1888); J. Schouler, *A Treatise on the Law of Domestic Relations* 335-353 (3d ed. 1882); J. Kent, 2 *Commentaries,* 203-206 (3d ed. 1832); W. Blackstone, *Commentaries* *452-453.

against state-imposed burdens on the right to abortion here could not be greater than its obligation to assure that the State meticulously avoid even apparent involvement in private racially discriminatory practices, a requirement this Court imposed in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

In contrast to the Utah law, the statutes at issue in *Danforth* and *Bellotti,* by requiring parental consent, compelled parents to reach a conclusion whether or not to permit their minor daughter to effectuate a provisional abortion decision. Under the Missouri statute of *Danforth* the parental decision was conclusive. Under the Massachusetts statute of *Bellotti* a parental decision to permit abortion was conclusive, while a parental decision against abortion was subject to a subsequent judicial decision to permit it. In both cases the principle "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act" applied. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 170 (1970), quoted with approval in *Flagg Brothers, Inc.* v. *Brooks,* 436 U.S. 149, 164 (1978). Since both laws compelled parents to exercise effective authority over whether their daughter could obtain an abortion, subsequent parental conduct which might obstruct or unduly burden effectuation of the minor's decision was attributed to the State by this Court. *Bellotti* v. *Baird (II),* 443 U.S. at 647. (plurality opinion).

The laws at issue in *Bellotti* and *Danforth* were thus analogous to the Pennsylvania regulation, found unconstitutional in *Moose Lodge,* which required private clubs to comply with their own constitutions, even if their constitutions mandated discriminatory practices. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. at 178-179. Although each club's policy of discrimination was formulated through the pri-

vate decisions of its members, the obligation the State imposed upon the clubs to comply with their own discriminatory policies necessarily implicated the State in such discriminatory practices. Similarly, the laws at issue in *Danforth* and *Bellotti*, by requiring parental consent for the minor to obtain an abortion, compelled parents to implement their own private views on abortion and effectively to apply them to their daughter. Therefore, any other subsequent conduct of parents which burdened or obstructed effectuation of the minor's abortion was imputed to the State by this Court.*

In *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), this Court held that a statute which specifically authorized warehousemen to conduct sales of goods in their possession did not make their acts "state action," ruling that "[t]his Court . . . has never held that a State's acquiescence in private action converts that action into that of the State."

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* The Massachusetts law at issue in *Bellotti* not only granted parents the initial power to determine whether or not the minor should procure an abortion, but also involved parents in any judicial hearing held later to determine whether or not the parent's decision should be overruled. Insofar as the parents' views on their daughter's abortion would be heeded and enforced through the judicial hearing contemplated under the Massachusetts law—as the requirement of parental notice of the proceeding implied they would be—the State might have been implicated in any parental effort to block or burden effectuation of the abortion. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Under the Utah law, on the other hand, the State does not provide any enforceable means, judicial or otherwise, by which the parents may obstruct the abortion. Simply provided with the knowledge of a proposed abortion, the parents are otherwise left to their own devices. In this regard, the State involvement in parental conduct here is far less than in judicial enforcement of a trust which provided that a park be operated on a racially discriminatory basis. *Cf. Evans* v. *Abney*, 396 U.S. 435 (1970).

Id. at 164. Even implied state approval, unless the State "has put its weight on the side of the proposed practice by ordering it, does not transmute a practice . . . into 'state action.'" *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 437. Utah does not even *acquiese* in parental obstruction of abortion. Rather, it seeks to advance parent-child consultation on a matter of great moment to the child's life.

Thus, whatever parents may do, there is no state action obstructive of a minor's abortion under the Utah parental notice law. But even if there were, this would not warrant the conclusion that parental conduct could properly be attributed *to the statute* such that the statute could be stricken because of the prospect of such conduct.

The argument to the contrary is really based on the proposition that the State is responsible for any conduct a private party may undertake when the State releases information to him for proper and legitimate purposes. In the context of this case, the claim is that the State is responsible for the abusive conduct of parents because of the information the State gives them for the purpose of guiding and nurturing their children—and that giving such information to parents therefore is unconstitutional "state action." The adoption of this principle into state action doctrine, if applied consistently, would have absurd results.

Under *In re Gault*, 387 U.S. 1, 33-39 (1967), the State has not merely the authority but also the duty to inform parents when their children are arrested or subject to a court proceeding. It is probable that some parents, so informed, would act toward their child in a punitive manner; it is possible that they might mistreat them in ways very similar to those the Plaintiffs fear may be applied to pregnant minors. In addition, parents with strong notions of

morality might bring heavy psychological, and even physical, pressure to bear on their children to induce them not to exercise fundamental rights—for example, to confess instead of exercising the protected right against self-incrimination. Such parental actions, if attributed to the State, would clearly be unconstitutional. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Should the parents be considered agents of the State in such actions merely because they were notified by the State of their child's arrest or pending court proceeding, and should the state practice of making such notifications be declared unconstitutional?

Federal law requires that educational institutions receiving federal funds allow parents "to inspect and review the educational records of their children." 20 U.S.C. §1232g(a)(1)(A) (1977). Some parents might misuse that information through overly punitive treatment of the child; parental knowledge of bad grades might even lead to child abuse. Should a parent who abuses his or her child after receiving information required to be given him or her by the State be deemed an agent of the State, and should the federal law be declared unconstitutional?

As this Court has recently held, even when state officials paroled a prisoner with a known history as a violent criminal, the subsequent murder committed by the released prisoner could not properly be imputed to the State. *Martinez* v. *State of California,* 100 S. Ct. 553 (1980). A state decision "that has an incremental impact on the probability that death will result in any given situation . . . cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events" that leads to someone's death. *Id.* at 557. The release of information to parents concerning their minor daughter's proposed abortion can hardly be said to entail any risk comparable to that associated with the release of a criminal

with a known history of violence. Yet if the State is not to be held responsible for the subsequent conduct of such a criminal—and, indeed, if it may properly render absolutely immune the officials responsible for his release, *id.* at 558—it surely cannot be held responsible for any and all parental conduct which might conceivably occur following notice to the parents of their minor daughter's proposed abortion. To paraphrase this Court, a law that may have an "incremental impact" on the probability that a minor will not procure an abortion cannot be characterized as "state action" just because, by providing the parents with knowledge of their daughter's proposed abortion, it "may set in motion a chain of events" which leads to parental obstruction of the minor's decision to abort.

II.

THE UTAH PARENTAL NOTICE STATUTE IS SUPPORTED BY SIGNIFICANT STATE INTERESTS IN PROTECTION OF PARENTAL RIGHTS AND INTERESTS IN CHILD-REARING AND IN PROTECTION OF THE INTEGRITY OF THE MINOR'S DECISION WHETHER OR NOT TO ABORT; IT RATIONALLY SERVES THOSE INTERESTS

The full Court has never explicitly stated the standard of review to be employed in assessing the constitutionality of legislation relating to minors upon an allegation that it violates their privacy rights. In *Planned Parenthood* v. *Danforth,* 428 U.S. at 75, however, the Court considered "whether there is any significant state interest . . . that is not present in the case of an adult," and upon identifying such a "suggested interest," considered whether the law at stake did in fact "serve" that interest. Citing *Danforth,* a plurality of four Justices in *Carey* v. *Population Services International,* 431 U.S. 678, 693 (1977), sug-

gested that "State restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest . . . that is not present in the case of an adult." It is evident from the opinions of the concurring Justices writing separately that they would apply, if anything, a less stringent standard.*

In any event, the Utah law rationally serves at least two significant state interests: in safeguarding the role of parents in child-rearing, and in assuring the informed and voluntary consent of the minor.

As this Court has held, the "guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Bellotti* v. *Baird (II)*, 443 U.S. at 637. Parents, "who have [the] primary responsibility for children's well-being, are entitled to the support of laws designed to aid the discharge of that responsibility." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). Both a minor's pregnancy and her contemplation of an abortion may implicate matters of profound concern to her parents, to the minor, and to society. If the fundamental right of parents to guide and nurture their children means anything, it surely includes an interest in providing what direction and assistance they can give to their daughter in such a situation. Nothing in our tradition has ever implied that the minor may properly claim that parents must, as a matter of constitutional law, remain ignorant of the

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* "[M]easurably contributes . . . to the . . . purposes which the State advances," *id.* at 703 (White, J., concurring in part and dissenting in part); "whether the restriction rationally serves valid state interests," *id.* at 707 (Powell, J., concurring in part and concurring in the judgment). Mr. Justice Stevens, while not articulating a standard, considered the limitation on the minor there at issue "irrational and perverse," *id.* at 678 (Stevens, J., concurring in part and concurring in the judgment).

minor's perhaps otherwise secret course of sexual and reproductive conduct. Indeed, it would be fundamentally unfair to charge parents with the continued legal responsibility to control and nurture their minor children yet, at the same time, to deny them knowledge necessary to discharge that duty.* The Constitution is not engaged in a

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* It is hardly unreasonable for the State to provide parents simple *notice* prior to abortion performed on their minor daughter when

> [t]he general rule is that the consent of the parent is necessary for an operation on a child. *Zoski* v. *Gaines,* 271 Mich. 1, 260 N.W. 99 [1935]; *Moss* v. *Rishworth,* Tex. Crim. App. 222 S.W. 225 [1920]; *Rogers* v. *Sells,* 178 Okla. 103, 61 P.2d 1018 [1936]; *Browning* v. *Hoffman,* 90 W. Va. 568, 111 S.E. 492 [1922]; *Commonwealth* v. *Nickerson,* 87 Mass. (5 Allen) 518 [1862]; *Franklyn* v. *Peabody,* 249 Mich. 363, 228 N.W. 681 [1930].

Bonner v. *Moran,* 126 F.2d 121, 122 (D.C. Cir. 1941). *See also Stump* v. *Sparkman,* 435 U.S. 349, 366 (1978), (Stewart, J., dissenting).

> [U]nless there exists an emergency, which prevents any delay, or other exceptional circumstances, a surgeon who performs an operation upon a minor without the consent of his parents or guardian is guilty of a trespass and battery. This rule is not based upon the capacity of a minor to consent, so far as he is personally concerned . . . , but is based upon the right of parents whose liability for support and maintenance of their child may be greatly increased by an unfavorable result from the operational procedures upon the part of a surgeon. . . . In this respect, the law is consistent in that parental interest in and responsibility for a minor child are subject to corresponding supervision and control. And, since the parents of such a child are responsible for his nurture and training, and are liable for his maintenance and support, others will not be permitted to interfere with such relationship or with matters touching the child's personal welfare.

Lacey v. *Laird,* 166 Ohio St. 12, 19, 139 N.E.2d 25, 30 (1956).

(footnote continued)

conspiracy with the minor and her abortion service to deny parents their most fundamental interests.

Moreover, it must be presumed that the parents will act in the best interests of their daughter by providing her with support which, because of her possible vulnerability and incapacity, may be necessary for informed consent to the procedure. *See Parham* v. *J.R.*, 442 U.S. at 602. The minor is probably unaccustomed to making decisions of such import without the guidance of her parents. The facility at which she procures an abortion is often unlikely to provide her with any meaningful guidance, as Mr. Justice Stewart has noted in *Planned Parenthood* v. *Danforth*, 428 U.S. at 91 (Stewart, J., concurring). The minor is easily subject to peer pressure, the pressure of the male who impregnated her, and the suggestions of counselors or

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(footnote continued)

Utah has provided only one statutory exception to this rule, based on the State's compelling interest in the minor's health: a minor may secure treatment for venereal disease without parental consent. Utah Code Ann. §75-5-209 (1977). On the other hand, common law parental rights and responsibilities have been expanded or reinforced by statute in several ways. Under Utah law parents remain liable for the medical treatment of their minor children. Utah Code Ann. §§ 78-45-3, 4 (1977). Parents are liable for the property damage caused by their child. Utah Code Ann. §§ 78-11-20, 21 (1977). Similarly, parents of minors who shoplift are jointly and severally liable for the cost of the merchandise, court costs, and reasonable attorney fees. Utah Code Ann. § 78-11-16 (1977). Marriage for the minor under 16 years is prohibited and void without parental consent by oath. Utah Code Ann. § 30-1-2 (1977). By implication, the minor cannot donate blood without parental consent. Utah Code Ann. § 15-2-5 (1977). A minor may not be a principal in a boxing match or contest without parental consent. Utah Code Ann. § 11-5-1 (1977). A minor may not be a safety patrol without parental consent. Utah Code Ann. § 53-12-1 (1979 Supp).

physicians at the facility or elsewhere.* Thus, it is reasonable for the State to conclude that, in view of the vulnerability of the minor, some parental involvement is necessary and desirable to provide the minor with perspective in her decision-making process. The minor has a right to continue her pregnancy to childbirth "at least" as strong as her right to terminate it. *Maher* v. *Roe*, 432 U.S. 464, 472 n.7 (1977). Yet the chance that without parental involvement the minor will sacrifice her right to continued childbearing as a result of the undue influence of third-parties is at least as great as the chance that her right to abortion may be sacrificed by virtue of the limited parental involvement the Utah law provides.

If the existence of potential effects on constitutionally protected decision-making were to be held always to outweigh the significant state interest in parental guidance of children, the results would be far-reaching.

For example, as Mr. Justice Stewart has noted, the First Amendment secures for the minor the same "liberty of each man to decide for himself what he will read and to whom he will listen" as for the adult, subject only to those limitations which may be imposed because the minor may lack "that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York*, 390 U.S. at 650 (Stewart, J., concurring in the

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* Insofar as the minor is induced to procure abortion contrary to parental values, the law has traditionally implied that parents' rights and interests have been violated. A private party who engages the minor in sexual conduct, with or without the minor's consent, is liable for seduction for interference with family relations. See W. Prosser, *Law of Torts* 884-886 (4th ed. 1971). Utah has by statute authorized parents to sue on behalf of the minor who has been seduced, whether or not the minor is living with the parents and whether or not there is a loss of service. Utah Code Ann. § 78-11-5 (1977).

result). *See also Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969). Yet educational institutions customarily notify parents of both the progress and the nature of the course of study their minor child pursues. Indeed, when these institutions receive federal funds, they are required to do so by federal law. 20 U.S.C. §1232g(1)(A) (1977). The impact of such parental notice on the First Amendment right "to decide for himself what he will read and to whom he will listen" of the minor who fails parental expectations, or who might wish to adopt a course of study which varies from parental preference, is often severe. If this Court would not strike down the parental notification requirement concerning grades and subjects as a "burden" on the explicit First Amendment rights of the minor, neither should it find that the Utah parental notice law constitutes an undue burden on the effectuation of a minor's abortion decision.

The social and individual effects of the Utah law may well be subject to policy debate. The Utah legislature hoped that the law, by making possible familial consultations which might not otherwise have taken place, would enhance the quality of the minor's decision-making and provide her with much-needed perspective and emotional support. Whether such parental consultation is desirable in all cases is a matter for the legislature. As Mr. Justice Cardozo wrote for the Court in *Helvering* v. *Davis,* 301 U.S. 619, 644 (1937), "Whether wisdom or unwisdom resides in [the statute before us], it is not for us to say. The answer to such inquiries must come from [the legislature], not the Courts. Our concern here, as often, is with power, not with wisdom."

Since, in judging state laws dealing with minors, this Court has indicated they need only rationally "serve" the significant interests which justify them, they need not be drawn with such precision as to account for every circumstance that might arise. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970) (applying the "rational relation-

ship'' test in a case involving equal protection analysis). Although there might be some instances in which the parents will not provide minors with supportive assistance or guidance, the conceivable presence of such isolated exceptions does not make Utah's action unreasonable.

Protection of the fundamental rights of parents and of the integrity of the minor's decision to exercise one fundamental right or the other—to continue to bear a child or to terminate pregnancy—are certainly significant state interests. If Utah wished to protect these interests at all, it is difficult to see how it could have fashioned its law differently.

One of the Plaintiff-Appellant's amici suggests a scheme whereby the minor's physician would be granted the authority to determine whether the parents should be notified or not.* But the physician is not professionally competent to make such a determination—his conclusion would have nothing to do with his technical training or expertise unless, perhaps, he were a psychiatrist. ''[T]he most significant consequences of the decision are not medical in character.'' *Planned Parenthood* v. *Danforth,* 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part).

Moreover, such a scheme would grant to a private third-party with an economic interest in performing the abortion—and thus a possible conflict of interest with the minor's best interests—the power arbitrarily to determine whether the parents would properly exercise their rights and interests. It improperly presumes that a physician who probably does not know the minor's parents and who may not even have seen the minor before the proposed abortion would be in a better position to ascertain the minor's competence or best interests than the parents, who have probably known her all her life. It must be doubted that such a

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* Brief of Coalition for the Medical Rights of Women, *et al.,* at 59-63.

law would rationally serve either the state interest in protection of parental prerogatives or the state interest in assurance of the minor's competent consent.

The presumption that parents will act in the best interests of their minor daughter fully supports the inference that the Utah law substantially relates to the interests it serves. Surely, if parents may confine a minor, perhaps for life, to a mental institution with the concurrence of a physician, *Parham* v. *J.R.*, 442 U.S. 584 (1979), providing parents with simple notice that an abortion is to be performed on their minor daughter is not unconstitutional.

CONCLUSION

The Utah parental notice statute neither represents state action which obstructs or unduly burdens effectuation of the minor's abortion, nor contravenes the minor's interest in preserving her abortion decision from "public" disclosure. It serves the State's significant interests in protection of parental child-rearing rights and in protection of the integrity of the minor's decision whether or not to abort.

WHEREFORE, your Amicus prays this Court to sustain the decision of the Supreme Court of the State of Utah, finding this law constitutional.

Respectfully submitted,

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